

IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P. (C) 6614/2008 & CM APPL No. 12685/2008

Reserved on: 8th July, 2010
Decision on: 30th July, 2010

ARVIND KEJRIWAL Petitioner
Through Mr. Prashant Bhushan with
Ms. Girija Kishan Verma and
Mr. Rishikesh Kumar, Advocates.

versus

CENTRAL PUBLIC INFORMATION OFFICER, CABINET
SECRETARIATRespondent
Through Mr. S.K. Dubey with
Mr. Vanshdeep Dalmia and
Mr. Abhinav Rao, Advocates.

WITH

W.P.(C) 8999/2008 & CM APPL. No. 7517/2008

UNION OF INDIA Petitioner
Through Mr. S.K. Dubey with
Mr. Vanshdeep Dalmia and
Mr. Abhinav Rao, Advocates.

versus

ARVIND KEJRIWALRespondent
Through Mr. Prashant Bhushan with
Ms. Girija Kishan Verma and
Mr. Rishikesh Kumar, Advocates.

AND

W.P.(C) 8407/2009 & CM APPL. 5286/2009

UNION OF INDIA Petitioner
Through Mr. S.K. Dubey with
Mr. Vanshdeep Dalmia and
Mr. Abhinav Rao, Advocates.

versus

ARVIND KEJRIWAL Respondent
Through Mr. Prashant Bhushan with
Ms. Girija Kishan Verma and
Mr. Rishikesh Kumar, Advocates.

CORAM: JUSTICE S. MURALIDHAR

- | | |
|--------------------------------------------------------------------------|-----|
| 1. Whether Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in Digest? | Yes |

J U D G M E N T

1. A short but interesting question arises for determination in these petitions arising out of an order dated 12th June 2008, passed by the Central Information Commission ('CIC'). That question is whether the information seeker Mr. Arvind Kejriwal can be provided with copies of documents in the files concerning appointments at the levels of Deputy Secretary, Director, Joint Secretary, Additional Secretary and Secretary in the Government of India without the procedure outlined in Section 11(1) of the Right to Information Act, 2005 ('RTI Act') having to be followed?

2. The CIC allowed Mr. Kejriwal inspection of the relevant files concerning empanelment of Additional Secretaries and Secretaries to the Government of India and he was to be provided by the Department of Personnel and Training ('DoPT'), Government of India copies of the documents and records, as might be specified by him after inspection. Further, it was held that since Mr. Kejriwal had already been allowed inspection of the files of the appointments of officers in the rank of Deputy Secretary, Director and Joint Secretary, the denial of photocopies of the documents was not justified. These documents included the annual confidential rolls ('ACRs'), the grading of the officers, their vigilance clearance etc., However, since Mr. Kejriwal

himself stated that he did not want copies of the ACRs of each of the officers “but required only the chart which contained the grading of the officers” and “since such chart would not contain any personal information”, the CIC directed the DoPT to provide copies of the chart to him within 20 working days.

3. Mr. Kejriwal has filed Writ Petition (Civil) No. 6614 of 2008 seeking implementation of the above order dated 12th June 2008 of the CIC. The Union of India (‘UOI’) has filed Writ Petition (Civil) No. 8999 of 2008 challenging the said order. It has also filed Writ Petition (Civil) No. 8407 of 2009 challenging a subsequent order dated 27th November 2008 passed by the CIC taking exception to the DoPT’s non-compliance of its earlier order dated 12th June 2008 and directing compliance by 30th December 2008.

4. While directing notice to be issued in the Writ Petition (C) No. 8999 of 2008 filed by the Union of India, this Court stayed the operation of the impugned order dated 12th June 2008 of the CIC. Likewise, in Writ Petition (Civil) No. 8407 of 2009 while directing notice to be issued, this Court stayed the operation of the impugned order dated 27th November 2008.

5. The background to the proceedings before the CIC has been set out elaborately in the impugned order dated 12th June 2008 of the CIC. Mr. Kejriwal sought information from the DoPT by filing three separate applications on 17th November 2005 under the RTI Act. This

information related to empanelment of officers in the Government of India at the level of (i) Deputy Secretary and Director (ii) Joint Secretary (iii) Additional Secretary and above. Under each category the Petitioner sought the following information:

“(i) Service-wise list of all the officers empanelled during Financial Years 2004-05 and 2005-06 for the posts of Deputy Secretary, Director, Joint Secretary and Additional Secretary & above and date of empanelment of each officer.

(ii) List of all posts of Deputy Secretary, Director, Joint Secretary and Additional Secretary & above on which, appointments were made under Central Staffing Scheme (CSS) during the Financial Years 2004-05 and 2005-06.

(iii) After the panels of suitable officers have been made, what is the procedure for appointing officers at various posts falling vacant at these levels. Which clause of the Central Staffing Scheme deals with the selection of officers from the panels and their final appointment? Please give copies of all Rules, Regulations etc. which guide this process.

(iv) Inspection of all files, including file notings, through which the officers were picked up from panels for particular posts during the period from January, 2005 till date.

(v) For each of the appointments done at these levels during the Financial Years 2003-04 and 2004-05 and till date in the current year, please indicate how the bio-data of appointed officer was considered more suitable than the others for that post.”

6. While some of the information was provided, the Central Public Information Officers (‘CPIOs’) justified the withholding of the remaining information stating that information relating to the Cabinet Secretary and the Secretaries of the other departments was exempted under Section 8 of the RTI Act. Secondly, the information concerning

empanelment of the officers was personal to those officers and had no relationship with any public activity or interest. It would constitute an unwarranted invasion of the privacy of the individuals and, therefore, could not be disclosed under Section 8(1)(j) of the RTI Act. Thirdly, the records which form part of the decision of the Appointments Committee of the Cabinet (hereafter 'the ACC') and the recommendations thereon were 'privileged' and could not be disclosed under Section 8 of the RTI Act.

7. The Appellate Authority remanded the matter to the CPIOs by separate orders passed on 3rd February 2006 and 13th March 2006. Among the observations made by the Appellate Authority was that the information sought by Mr. Kejriwal pertained to a third party and fell within the provisions of Section 11(1) of the RTI Act. Therefore, it was obligatory on the part of the CPIOs to issue notice to such third parties and invite them to make submissions, in writing or orally, as to whether the information could be disclosed. Further, since the information sought would involve compilation of a huge amount of data, this aspect was also required to be considered by the CPIOs.

8. Aggrieved by the above order, Mr. Kejriwal filed a second appeal before the CIC. During the course of the said appeal, Mr. Kejriwal submitted that "he did not require the information in any particular format" and that "he may simply be allowed inspection of all files so that he could specify the documents, copies whereof he desired to have." In response to the submission of the UOI that allowing

inspection of so many files could disrupt the normal functioning of the DoPT as there would be more than 600 files, Mr. Kejriwal suggested that “he should be allowed inspection of 10-20 files everyday in such a way that it did not disrupt the functioning of the Department”.

9. On 14th July 2006, the CIC noted that during the course of the hearing, the CPIOs agreed to dispose of the cases remanded by the Appellate Authority within one month and that “the CPIO would find ways and means to provide information to the Appellant in the light of these discussions”. It was noted that “there seems to be no objection on the part of DoPT to provide information. The only issue is how to provide it considering its voluminous nature.”

10. When the Petitioner went back to the CIC complaining of non-implementation of its directions, notices were again issued to the CPIOs by the CIC asking for a compliance report. As regards information concerning the appointments of Deputy Secretaries and Directors, the concerned CPIO informed the CIC by his letter dated 27th February 2007 that Mr. Kejriwal had already examined all the files, noted down their details and, therefore, the order of the CIC dated 14th July 2006 stood complied with. It was further submitted that “copies of the examination report, files and notings include personal information of the officers and, as such, furnishing of the said information would attract Section 11(1) of the RTI Act. Since it was a major exercise it would also attract the provisions of Section 7(9) of the RTI Act.”

11. As regards appointments at the level of Joint Secretary, the concerned CPIO informed the CIC that Mr. Kejriwal had been allowed to inspect those files as well. However, the copies of the examination report as sought by Mr. Kejriwal included the officers' ACRs, gradings, their vigilance clearance reports etc. Therefore, providing that information would attract Section 11(1) of the RTI Act. As regards appointments at the level of Additional Secretary and Secretary, the CPIO informed that the Cabinet Secretariat had been asked to provide the information and Mr. Kejriwal had been requested to inspect the files relating to the appointments at the level of Additional Secretary and Secretary.

12. The CIC apparently was satisfied and the Petitioner was informed by a letter dated 18th April 2007 that with the above compliance no further action was required. However, on 20th April 2007 Mr. Kejriwal filed an application before the CIC seeking a review. The CIC on 14th July 2007 passed an order dismissing the review petition. This was challenged by the Petitioner by filing Writ Petition No. 6777 of 2007 in this Court. By an order dated 14th September 2007 this Court remanded the case to the CIC to be heard by a Bench constituted by the CIC.

13. During the hearing after remand before the CIC on 19th February 2008 the Section Officer and the CPIO in the DoPT informed the CIC that the copies of the examination reports, file notings and

correspondence sought by Mr. Kejriwal included personal information of the officers which apart from being voluminous would also attract Section 11(1) of the RTI Act. Seeking prior permission of such officers would itself be a major exercise. It was noted that in any case, Mr. Kejriwal had already examined all the files and noted down the details which had been brought to the notice of the CIC by an order dated 17th December 2007.

14. The other CPIO informed the CIC that Mr. Kejriwal had examined all the files pertaining to appointments at the level of Deputy Secretary and Director for the years 2004 and 2005 “for about two hours each day for several days.” Mr. Kejriwal “was also provided a list of all appointments made during 2005 at the levels of Deputy Secretaries and Directors”. Mr. Kejriwal’s request to provide “copies of the files for the year 2006” could not be acceded to as it was voluminous attracting Section 7(9) of the RTI Act. As regards the empanelment of officers in the select list of Joint Secretary, Mr. Kejriwal was informed that “the grounds for determining the eligibility had been laid down in the provisions of the Central Staffing Scheme (‘CSS’), a copy of which had been provided to it”. Mr. Kejriwal was informed that “all the officers from a given batch were not sponsored by the respective cadre controlling authorities of Group ‘A’ services in the earlier years”. The reasons why the remaining officers were not sponsored for empanelment would be available with the respective cadre controlling authorities. Accordingly Mr. Kejriwal was provided a list of the services and the respective cadre controlling

authorities. As regards the DoPT which was the cadre controlling authority in respect of the IAS, information was provided to Mr. Kejriwal.

15. Consequently, the only point that remained to be considered by the CIC was whether Mr. Kejriwal should be given copies of the documents which he had already inspected. As regards the information being of a voluminous nature, Mr. Kejriwal limited the information sought to the appointment of senior officers over a period of three years. Therefore, as regards the information concerning the officers at the level of Deputy Secretary, Director and Joint Secretary, inspection of the files had already been done and the CIC noted that “the only question that now remained was whether photocopies of the concerned files could be given or not”. Since the DoPT had not furnished any proper information, the CIC ordered that Mr. Kejriwal should be furnished with copies of the documents he was seeking within 20 days.

16. As regards the files concerning the empanelment of Additional Secretaries and Secretaries, the CIC again directed that Mr. Kejriwal should be provided the copies of the documents and records after inspection.

17. In view of the narrow issue that was examined by the CIC in its impugned order, both Mr. Prashant Bhushan, learned counsel appearing on behalf of Mr. Arvind Kejriwal and Mr. S.K. Dubey,

learned counsel appearing for the Union of India confined their arguments to the question whether providing copies of the above documents, as sought by Mr. Kejriwal, would attract the provisions of Section 11(1) of the RTI Act.

18. In order to appreciate their respective contentions, it is first necessary to refer to Section 11(1) of the RTI Act which reads as under:

“11. Third party information .- (1)Where a Central Public Information Officer or the State Public information Officer, as the case may be, intends to disclose any information or record, or part thereof on a request made under this Act, **which relates to or has been supplied by a third party** and has been treated as confidential by that third party, the Central Public Information Officer or State Public Information Officer, as the case may be, shall, within five days from the receipt of the request, give a written notice to such third party of the request and of the fact that the Central Public Information Officer or State Public Information Officer, as the case may be, intends to disclose the information or record, or part thereof, and invite the third party to make a submission in writing or orally, regarding whether the information should be disclosed, and such submission of the third party shall be kept in view while taking a decision about disclosure of information:

Provided that except in the case of trade or commercial secrets protected by law, disclosure may be allowed if the public interest in disclosure outweighs in importance any possible harm or injury to the interests of such third party.”
(emphasis supplied)

19. According to Mr. Bhushan, the ‘third party information’ is that information which is in fact provided by the third party and further should be asked by the said third party to be kept confidential. It is only when both these conditions are fulfilled that Section 11(1) of the RTI Act is attracted. In other words, although Section 11(1) of the RTI Act indicates that where the information sought “relates to or has been supplied by a third party” the word ‘or’ should be read as ‘and’ for only then the provision would be workable. It was submitted that unless the above interpretation is placed on Section 11(1), it will not be possible for a person to access information relating to appointments to the various posts in the Government of India.

20. On the other hand, it was submitted by Mr. Dubey that there was no scope to substitute the word ‘or’ with the word ‘and’ and that since the statute was unambiguous it had to be read as such. He submitted that information pertaining to ACRs, vigilance reports etc., of an individual officer and their collation even in the form of a chart would be information personal to such officers and has to be viewed as ‘third party information’. It is submitted that in such event the mandatory procedure outlined under Section 11(1) of the RTI Act has to be followed.

21. This Court has considered the above submissions. It requires to be noticed that under the RTI Act information that is totally exempt from disclosure has been listed out in Section 8. The concept of privacy is incorporated in Section 8(1)(j) of the RTI Act. This provision would

be a defense available to a person about whom information is being sought. Such defence could be taken by a third party in a proceeding under Section 11(1) when upon being issued notice such third party might want to resist disclosure on the grounds of privacy. This is a valuable right of a third party that encapsulates the principle of natural justice inasmuch as the statute mandates that there cannot be a disclosure of information pertaining to or which 'relates to' such third party without affording such third party an opportunity of being heard on whether such disclosure should be ordered. This is a procedural safeguard that has been inserted in the RTI Act to balance the rights of privacy and the public interest involved in disclosure of such information. Whether one should trump the other is ultimately for the information officer to decide in the facts of a given case.

22. Turning to the case on hand, the documents of which copies are sought are in the personal files of officers working at the levels of Deputy Secretary, Joint Secretary, Director, Additional Secretary and Secretary in the Government of India. Appointments to these posts are made on a comparative assessment of the relative merits of various officers by a departmental promotion committee or a selection committee, as the case may be. The evaluation of the past performance of these officers is contained in the ACRs. On the basis of the comparative assessment a grading is given. Such information cannot but be viewed as personal to such officers. *Vis-à-vis* a person who is not an employee of the Government of India and is seeking such information as a member of the public, such information has to

be viewed as constituting 'third party information'. This can be contrasted with a situation where a government employee is seeking information concerning his own grading, ACR etc. That obviously does not involve 'third party' information.

23. What is, however, important to note is that it is not as if such information is totally exempt from disclosure. When an application is made seeking such information, notice would be issued by the CIC or the CPIOs or the State Commission, as the case may be, to such 'third party' and after hearing such third party, a decision will be taken by the CIC or the CPIOs or the State Commission whether or not to order disclosure of such information. The third party may plead a 'privacy' defence. But such defence may, for good reasons, be overruled. In other words, after following the procedure outlined in Section 11(1) of the RTI Act, the CIC may still decide that information should be disclosed in public interest overruling any objection that the third party may have to the disclosure of such information.

24. Given the above procedure, it is not possible to agree with the submission of Mr. Bhushan that the word 'or' occurring in Section 11 (1) in the phrase information "which relates to or has been supplied by a third party" should be read as 'and'. Clearly, information relating to a third party would also be third party information within the meaning of Section 11(1) of the RTI Act. Information provided by such third party would of course also be third party information. These two

distinct categories of third party information have been recognized under Section 11(1) of the Act. It is not possible for this Court in the circumstances to read the word 'or' as 'and'. The mere fact that inspection of such files was permitted, without following the mandatory procedure under Section 11(1) does not mean that, at the stage of furnishing copies of the documents inspected, the said procedure can be waived. In fact, the procedure should have been followed even prior to permitting inspection, but now the clock cannot be put back as far as that is concerned.

25. The logic of the Section 11(1) RTI Act is plain. Once the information seeker is provided information relating to a third party, it is no longer in the private domain. Such information seeker can then disclose in turn such information to the whole world. There may be an officer who may not want the whole world to know why he or she was overlooked for promotion. The defence of privacy in such a case cannot be lightly brushed aside saying that since the officer is a public servant he or she cannot possibly fight shy of such disclosure. There may be yet another situation where the officer may have no qualms about such disclosure. And there may be a third category where the credentials of the officer appointed may be thought of as being in public interest to be disclosed. The importance of the post held may also be a factor that might weigh with the information officer. This exercise of weighing the competing interests can possibly be undertaken only after hearing all interested parties. Therefore the

procedure under Section 11(1) RTI Act.

26. This Court, therefore, holds that the CIC was not justified in overruling the objection of the UOI on the basis of Section 11(1) of the RTI Act and directing the UOI and the DoPT to provide copies of the documents as sought by Mr. Kejriwal. Whatever may have been the past practice when disclosure was ordered of information contained in the files relating to appointment of officers and which information included their ACRs, grading, vigilance clearance etc., the mandatory procedure outlined under Section 11(1) cannot be dispensed with. The short question framed by this Court in the first paragraph of this judgment was answered in the affirmative by the CIC. This Court reverses the CIC's impugned order and answers it in the negative.

27. The impugned order dated 12th June 2008 of the CIC and the consequential order dated 19th November 2008 of the CIC are hereby set aside. The appeals by Mr. Kejriwal will be restored to the file of the CIC for compliance with the procedure outlined under Section 11 (1) RTI Act limited to the information Mr. Kejriwal now seeks.

28. Writ Petition (Civil) No. 6614 of 2008 filed by Mr. Arvind Kejriwal is dismissed and Writ Petition (Civil) Nos. 8999 of 2008 and 8407 of 2009 filed by the Union of India are accordingly allowed,

with no order as to costs. All the pending applications stand disposed
of.

S. MURALIDHAR, J

JULY 30, 2010
ak